IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 347 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Versus

SHRICHAND BHOJRAJ NARANG

Appearance:

Mr. L.R. Pujari, APP, for Appellant

MR DI DESAI for Respondent No. 1

SERVED for Respondent No. 2

CORAM : MR.JUSTICE J.M.PANCHAL and MR.JUSTICE M.H.KADRI

Date of decision: 29/07/97

ORAL JUDGMENT : (Per: Panchal, J.)

By means of filing this appeal under Section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has questioned the legality and propriety of the judgment and order dated February 21, 1991, rendered by the learned Additional City Sessions Judge, Court No.18, Ahmedabad, in Sessions Case No. 209 of 1990, acquitting the respondents of the offences punishable under Sections 324, 392, 397 of the Indian Penal Code and

Section 135(1) of the Bombay Police Act, 1951.

On July 9, 1989, at about 5.45 p.m. Rameshbhai Chhanabhai Makwana, who is the original informant, was passing on the road riding his bicycle opposite Medhabhai Chali, Near Noormahel Hotel, Ahmedabad. At that time, a white coloured Ambassador Car came and intercepted the complainant. In furtherance of common intention, one of the occupants of the car alighted from car, caused injury on the wrist of the complainant Rameshbhai by means of a razor and robbed him of his wrist watch. Thereafter, the accused ran away in the car. Rameshbhai therefore went to Gomtipur police Station and lodged complaint which was registered as C.R. No.I-218/89 for the offences punishable under Sections 324, 392 and 114 of the Indian Penal Code and Section 135(1) of the Bombay Police Act. During the course of investigation, accused Shrichand Bhojraj Narang was arrested on July 10, 1989, accused Gopi alias Abbas alias Pappu was arrested on July 11, 1989, accused Mohammed Yasin alias Munno was also arrested on July 11, 1989, and the fourth accused, i.e. Vinod alias Don Zinabhai Gajjar was arrested on August 21, 1989. The original accused Nos. 1, 2 and 4 were enlarged on bail, but, the application for bail submitted by accused No.3, i.e., Mohammed Yasin alias Munno was rejected by the learned Metropolitan Magistrate, Court No.10, Ahmedabad. On completion of investigation, the accused were chargesheeted for the offences punishable under Sections 394, 114 of the Indian Penal Code and Section 135(1) of the Bombay Police Act in the court of the learned Metropolitan Magistrate, Court No.10, Ahmedabad. Though the original accused No.4 was enlarged on bail, he did not remain present before the court on the adjourned dates and, therefore, warrant for his arrest was issued by the learned Metropolitan Magistrate and he was taken into custody. It was noticed that the original accused No.2, Gopi alias Abbas alias Pappu, who was enlarged on bail, was absconding since April 4,1990. As the original accused Nos. 3 and 4 were in custody, and accused No.2 was absconding, the learned Metropolitan Magistrate, Court No.10, Ahmedabad, by order dated July 20, 1990, gave appropriate directions for separating the case of the original accused No.2 from that of the original accused Nos. 1,3 and 4. The learned Additional Public Prosecutor submitted an application in the court of the learned Metropolitan Magistrate, Court No.10, Ahmedabad, stating that commission of offence punishable under Section 397 of the Indian Penal Code was also disclosed and, therefore, the chargesheet should be accordingly amended. The learned Judge accepted the said request by order dated December 29, 1989 and ordered to

add Section 397 of the Indian Penal Code in the chargesheet. As offence punishable under Section 397 of the Indian Penal Code is exclusively triable by a court of sessions, the case was committed to the Sessions Court for trial vide order dated July 21, 1990 against the original accused Nos. 1,3 and 4 because case against the original accused No.2 was already ordered to be separated. It may be stated that the learned Metropolitan Magistrate, Court No. 10, Ahmedabad, had enlarged accused Mohammed Yasin alias Munno Abdul Kadar Shaikh on bail by order dated July 20, 1990, in exercise of powers under Section 437(6) of the Code of Criminal Procedure, 1973.

The case which was committed to the Sessions Court against the original accused Nos. 1,3 and 4 was registered as Sessions Case No. 209 of 1990. The learned Judge framed appropriate charge vide Exh.4. However, when the case came up for hearing, it was noticed that accused Mohammed Yasin alias Munno was absconding and the trial was being delayed. In the meanwhile, accused Gopi alias Abbas alias Pappu whose case was already separated came to be apprehended and, therefore, the Investigating Agency submitted additional chargesheet against him for the offences punishable under Sections 392, 397, 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. Again, the case was committed to the Sessions Court for trial as offence punishable under Section 397 of the Indian Penal Code is exclusively triable by a court of sessions. The case against accused Gopi alias Abbas alias Pappu was registered as Sessions Case No.272 of 1990. The learned Additional City Sessions Judge, Court No.18, Ahmedabad, by judgment and order dated December 4, 1990, acquitted Gopi alias Abbas alias Pappu Balkishan Nair.

When Sessions Case No.209 of 1990 was taken up for hearing, it was found that accused Mohammed Yasin alias Munno was found to be absconding, whereas accused No.4, i.e, Vinod alias Don Zinabhai Gajjar was in jail since long. Under the circumstances, in view of the application dated January 21, 1991, submitted by the learned Additional Public Prosecutor, trial against the original accused No.2, i.e. Mohammed Yasin alias Munno, was ordered to be separated. In Sessions Case No. 209 of 1990, the learned Additional City Sessions Judge, Court No.18, Ahmedabad, acquitted the original accused No.1 and the original accused No.4, by judgment and order dated February 21, 1991, which has given rise to the present appeal. It may be noted that presence of accused Mohammed Yasin alias Munno was subsequently procured and

case against him was registered as Sessions Case No.37 of 1991. In Sessions Case No. 37 of 1991, the learned Additional City Sessions Judge, Ahmedabad, convicted accused Mohammed Yasin alias Munno under Section 394 of the Indian Penal Code and sentenced him to undergo simple imprisonment for two months and fine of Rs.100/-, in default to undergo simple imprisonment for two days, vide judgment and order dated April 18, 1991.

Mr. L.R. Pujari, learned counsel for the appellant, pleaded that, as the witnesses were not present, the learned Additional Public Prosecutor had submitted application dated February 21, 1991 requesting the Sessions Court to procure presence of the witnesses by issuance of summons or bailable warrant, but, instead of securing presence of the witnesses through court process, the learned Judge acquitted the respondents and, therefore, the impugned judgment deserves to be set aside. It was claimed that, in exercise of powers conferred by Section 311 and 350 of the Code of Criminal Procedure, 1973, the court should have procured the attendance of witnesses and, as sufficient endeavour is not made by the learned Judge to do the real justice, the impugned judgment should be set aside and the matter should be remanded to the trial court with appropriate directions.

Mr.D.I. Desai, learned counsel for the respondents, submitted that sufficient opportunity was given to the prosecution to produce the witnesses in the court and, in view of the lethargy on the part of the prosecution agency, the impugned judgment should not be interfered with by this court. It was pleaded that the original accused No.2, i.e., Gopi alias Abbas alias Pappu, is already acquitted by the Sessions Court after fulfledged trial and, as no useful purpose is going to be served by remanding the matter, the impugned judgment should be upheld by this Court.

On going through the Rozkam proceedings, it is evident that the prosecution was given opportunity to produce witnesses in the court on January 21, 1991, February 5, 1991, February 11, 1991, and February 14, 1991. But the prosecution could not produce the witnesses in the court. On February 14, 1991, the matter was adjourned to February 21,1991. On that day, the learned Additional Public Prosecutor filed an application Exh.18, requesting the court to issue summons or bailable warrants for procuring attendance of the witnesses. The learned Judge rejected the said application by order dated February 21, 1991 observing that, as sufficient

opportunity was given to the prosecution to produce witnesses in the court, the prayer could not be granted. Thereafter, on the same day, the learned Judge took up Sessions Case No.209 of 1990 for hearing and acquitted the respondents vide judgment dated February 21,1991 on the ground that the prosecution failed to adduce any evidence against the accused.

It hardly needs to be emphasized that it is the duty and responsibility of the Court to do justice and if the trial court feels that the prosecuting agency is not able to produce witness in the court, it should either under Section 311 or under Section 350 of the Code of Criminal Procedure, 1973, compel attendance of the witness to do the real justice to the parties. If the prosecution fails to produce witness or if in spite of service of summons the witness does not appear before the court to give evidence, it becomes the duty of the court to use all coercive methods to secure attendance in the court. There is an express provision under the Code of Criminal Procedure enabling the Sessions Court on the application of the prosecution to issue summons to any one of its witnesses directing him to attend or to produce any document or any other thing and if the person to whom such a summons is served does not comply with it, a summary procedure for punishment for non-attendance by a witness in obedience to summons is clearly provided under the Code. The imparting of justice is always a matter of conscience and mere termination of a matter by itself means nothing. The trial judge must indeed feel hurt by such a recalcitrant witness if he does not come forth to help the cause of justice and he must make every permissible endeavour to see that the case is not frustrated or miscarried merely because later on the witness changes his mind. In the case of State of Gujarat v. Rajendrasinh Ramjansinh, 1996(3) GLR 470, following pertinent observations have been made by the Division Bench as to the duty of the court to resort to coercive method to ensure attendance of witnesses:

> "If the witnesses do not remain present at the trial, the trial Court is duty-bound in the first instance to issue bailable and failing this, even non-bailable warrants for securing their presence before the Court. In case, thereafter, even if the Investigating Agency is found to be not co-operating with the Court, then in that case, the learned trial Judge in the first instance, has a duty to summon, failing which, even issue non-bailable warrant, against the concerned Investigating Officer also calling upon him to show

> cause as to why witnesses were not kept present, what efforts he made to secure their presence, etc. etc. and to file appropriate affidavit describing the way in which he discharged his duty in tracing out and securing the presence of witnesses before the Court. And in case, if the Court after reading the affidavit of the Investigating Officer still feels that he or his subordinate process serving agency has committed wilful default in complying with Court's directions to serve summons or execute the warrant (as the case may be), then notice of Contempt of Court can and ought to be invariably issued against such erring Investigating Officers or process serving agencies. Similarly, in the second instance, it is also the duty of the Court to bring to the notice of D.S.P. or Commissioner of Police (as the case may be) with a copy to the Director General of Police bringing to their notice the inaction and remissness of the concerned Police Officer in not keeping the witnesses present before the Court which these Officers are directed to keep in the Confidential service record file of the concerned Police Officers. It is quite true that if the accused are on bail and they are unnecessarily subjected to inconveniences and hardships because witnesses were not kept present, the Court would certainly be not powerless to impose cost, even exemplary cost on the State and in given case to be paid by the concerned Police Officer from his pocket. If indeed the Court is inclined to do justice and nothing less than but justice, it has indeed all powers under the Criminal Procedure Code to effectively assert and impose, regulate and control the proceedings before it."

The submission that the original accused No.2, Gopi alias Abbas alias Pappu, is already acquitted and, therefore, the matter should not be remanded to the Sessions Court for retrial, is devoid of merit. Neither acquittal of accused No.2 nor conviction of Mohammed Yasin alias Munno is relevant for deciding the question which is posed for our consideration in this appeal. What is relevant is to find out whether the court has failed in its duty to do the real justice between the parties. On the facts and in the circumstances of the case, we are of the opinion that, instead of rejecting application dated February 21,1991 (Exh.18), the learned Judge should have either issued summons or bailable warrants in order to secure attendance of the witnesses. As the learned Judge has failed to adopt coercive methods to secure attendance

of the witnesses, we are of the view that the impugned judgment is liable to be set aside and the matter deserves to be remitted for retrial.

For the foregoing reasons, the judgment dated February 21, 1991, rendered by the learned Additional City Civil & Sessions Judge, Ahmedabad, in Sessions Case No. 209 of 1990, acquitting the respondents of the offences punishable under Sections 324, 392, 397 of the Indian Penal Code and Section 135(1) of the Bombay Police Act, is hereby set aside and quashed. The matter is remitted to the Sessions Court for retrial on merits. As the matter is fairly old, the trial court is directed to dispose of the Sessions Case as early as possible, preferably within three months from the date of receipt of the writ. The Office is directed to send R & P of Sessions Cases Nos. 201/90, 272/90, 209/990 and 37/91 to the trial court immediately.

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